IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Mst. Rahmat Bai & ors.	vs.	Smt. Mahroom & ors.

S.B. Civil Second Appeal No. 13/1990 against the judgment and decree dated 11.10.1989 passed by the learned Addl. District & Sessions Judge, Bhilwara in Civil Appeal No.86/86.

Date of Judgment: April 05, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Narendra Singh for Mr. J.K. Bhaiya for the appellants.

BY THE COURT:

Heard learned counsel for the appellants, as no body appeared on behalf of the respondents.

The learned counsel Shri R. Chauhan submits that after elevation of the learned counsel for the respondents, he gave notice to the respondents on 25.1.2000 itself and thereafter a letter was given to the local counsel on 12.10.2001 but no body contacted him, therefore, he has no instructions.

Since due information was given by the learned counsel Shri R. Chauhan to the respondents about the pendency of the appeal,

therefore, there is no need to issue further notice to the respondent particularly in view of the fact that since long the appeal has been shown in the cause list for hearing and is listed in court daily since last few months.

The appeal is against the judgment and decree of the two courts below ,i.e. trial court's judgment and decree dated 24.11.1979 passed in Civil Original Suit No.161/74 which was upheld by the first appellate court by judgment and decree dated 11.10.1989.

Brief facts of the case are that the plaintiffs Khaju, Ahmed and Fateh Mohd. filed suit for declaration, possession and mesne profits. The plaintiff's case as pleaded was that the property described in para 1 of the plaint was property of the plaintiffs and they were in possession of the suit property also. According to the plaintiffs, they also obtained *Patta* in the name of plaintiff no.1 in Samvat Year 1990 from the then Jagirdar of the area. Defendant nos. 1 and 2, the brothers of plaintiff no.1 and defendant no.3 mother of plaintiff no.1 had no right to sell the property in question but still they sold the property on 26.3.1974 to defendant no.4. According to the plaintiffs, defendant no.1 was knowing all the above facts, still he purchased the property collusively and with the help of sale-deed dated 26.3.1974 forcibly took possession of the suit property on 11.10.1974 when the plaintiff went to another village Kapasan. The plaintiffs before filing the present suit, lodged F.I.R. also

but since defendant no.4 was a retired police employee, therefore, because of his influence, the criminal action of defendant no.4 was treated as civil dispute and, therefore, the plaintiffs filed the suit for possession of the suit property and also prayed for declaration that the plaintiffs be declared owner of the property and further it may be declared that the sale-deed executed by defendants in favour of defendant no.4 is of no effect against the interest of the plaintiffs in the property in dispute.

Defendant no.1 and 4 submitted joint written statement and stated that in fact the property in question was of Karim Bux, father of plaintiff no.1 and defendant nos. 1 and 2 and husband of defendant no.3. According to the defendants, the plaintiff left the village about 25 years ago and started living at villages Dindoli and Kapasan and, therefore, according to the defendants, plaintiff no.1 or other plaintiffs had no share in the property in question. The defendants further pleaded that the *Patta* of Samvat Year 1990 was forged and was also inadmissible in evidence being unregistered. It is submitted that defendant nos.1,2 and 3 were in possession of the suit property as owner and they rightly sold the property to defendant no.4. In addition to above, the defendants pleaded that the suit property was mortgaged in the year 1969 by unregistered mortgage deed and to satisfy the mortgagees, name of plaintiff no.1, since he was son of Karim Bux, was

also mentioned in the mortgage deed but at that time also, plaintiff no.1 had no share in the suit property. It was agreed by plaintiff no.1 in writing by making endorsement on the mortgage deed itself that in case the mortgage will not be redeemed within three months, the defendants shall have right to redeem the mortgage and in that situation, the plaintiff no.1 will not be entitled to claim any share in the property. Thereafter, the plaintiff no.1 did not get the property redeemed and defendants got the property redeemed, therefore, the plaintiffs lost their right in the property. The evidence were produced by both the parties, oral as well as documentary. The trial court as well as the first appellate court held that the plaintiffs failed to prove the *Patta* which he alleged that that was issued in his favour in the Samvat Year 1990. The *Patta* was also held inadmissible in evidence for want of registration. The courts below observed that the plaintiff wrongly denied the mortgage of the year 1969 but from evidence it is proved that the said mortgage of 1969 was executed by the plaintiff and defendant nos.1 and 2's father Karim Bux. Both the courts below further held that plaintiff Khaju himself signed the endorsement by which he relinquished his share in case he fails to redeem the property and if the property is redeemed by the defendants. Therefore, the plaintiffs have no right in the property in dispute.

Since the suit of the plaintiff was dismissed and the first appeal

was also dismissed by the first appellant court, therefore this second appeal.

The learned counsel for the appellants submitted that the two courts below committed serious error of law in holding that the *Patta* (Ex.1) was inadmissible in evidence for want of registration. It is submitted that as per the local law as applicable in the State of Mewar, any Patta issued by the sovereign was not required to be registered. It is also submitted that since the *Patta* (Ex.1) was held not admissible in evidence, therefore, was not considered by the two courts below and thereby the two courts below committed error of law. According to the learned counsel for the appellants, in view of the Patta(Ex.1), plaintiff no.1 is owner of the property. It is also submitted that the two courts below committed serious error of law by holding that by Ex.A.2, an unregistered document, i.e. the endorsement made on the unregistered mortgage deed, the rights of the plaintiff stands extinguished. It is submitted that in fact the two courts at this time, failed to appreciate that Ex.A.2 has been pressed for destroying the rights of the plaintiff in the suit property then that extinguishment can only by registered deed. It is also submitted that in fact the mortgage deed itself was not admissible in evidence and, therefore, the courts below should not have taken into account the facts mentioned in the mortgage deed while deciding the suit. It is submitted that since it is admitted case of the

defendants in the year 1969, the plaintiff no.1's share was there in the property and that is why he was made party in the deed of mortgage set up by the defendants. The plaintiff filed the suit in the year 1974, therefore, by no stretch of imagination the rights of the plaintiff could have been extinguished.

Following substantial questions of law were framed by this Court while admitting the appeal on 5.12.1990:-

> *1) Whether the learned lower courts have erred in not taking into consideration the PATTA EX.-1 ?*
>
> *2) Whether the learned lower courts have erred in holding that rights of the plaintiff stood extinguished by the deed Ex.-A/2 ?*
>
> *3) Whether the plaintiff is entitled to the joint possession of the suit property if the question No.1 is decided against him and the question NO.2 is decided in his favour?"*

I considered the submissions of the learned counsel for the appellants and perused the record.

Issue no.2 virtually goes to the root of the matter because of the reason that even if substantial questionno.1 is decided against the appellants and it is held that Patta (Ex.1) is not genuine and by that Patta, the plaintiffs have not acquired any right, title and interest in the property even then the defendants' own case in the written statement is that plaintiff no.1's father Karim Bux was the owner of the property. It is

not the case of the defendants that there was partition between Karim Bux and plaintiff no.1 or there was partition amongst the heirs of Karim Bux, the plaintiff and defendant nos.1,2 and 3. The defendants themselves produced and relied upon the mortgage deed Ex.A-1. The plaintiff Ahmed in his statement also admitted that stamp for mortgage deed was purchased by his father and he also admitted his father's signature on the mortgage deed and thereafter also admitted his own signatures on the mortgage deed. In pleadings or in evidence, it was never the case of the defendants that otherwise than the unregistered endorsement of relinquishment of share by the plaintiff no.1 the the plaintiffs lost their right, title and interest in the property in dispute. The only plea was that plaintiff no.1 started living in different village. That plea was not sufficient for extinguishing the rights of the plaintiff. Not only this, the facts mentioned in the mortgage deed in the year 1969 can be looked into to find out the nature of the property and the rights of the parties as the said unregistered mortgage deed is inadmissible in evidence but for collateral purpose to find out the nature of the property and can be looked into so far as admissionof parties recognising the rights of parties to the document but cannot be admitted in evidence to prove extinguishment of right of the plaintiff. The explanation given by the defendants that the name of plaintiff no.1 was mentioned in the mortgage deed because he was son of Karim Bux

and was mentioned onto to satisfy the mortgagees, cannot be accepted because of the reason that if that was so then the deed should have contained the fact in the same way, by mentioning that name of plaintiff no.1 is given in the deed to satisfy the mortgagees only, otherwise plaintiff no.1 relinquished his share in the property on any earlier occasion.

The contention of the defendants that plaintiff no.1 left the village of the defendants 25 years ago and he had no share in the property in the year 1969, is self-contradictory. By this the defendants are saying that in the year 1969, plaintiff no.1 had no share in the property and because of his being son of Karim Bux and to satisfy the mortgagees, the name of plaintiff no.1 was given in the mortgage deed, but contrary to it, they are also saying that plaintiff no.1 relinquished his right, title and interest in the property by executing relinquishment deed which is a deed executed and accepted by the courts below as Ex.A-2. If in the year 1969, plaintiff no.1 had no share in the property and his name was mentioned in the mortgage deed only for satisfying the mortgagees then there was no reason for getting the relinquishment of the right and title of plaintiff no.1 in favour of the defendants in the year 1969. In fact the share of the plaintiff stands admitted by the documents produced by the defendants themselves and which could have been used only for collateral purpose and in fact the two courts

below considered Ex.A.1 and Ex.A.2 but misconstrued those documents.

In view of the above discussion it is clear that in fact by Ex.A.1, the right and title of the plaintiff in the suit property itself has been recognised by the defendants and it has not been extinguished by Ex.A.2 and Ex.A.2 is not registered document and it cannot be enforced against the plaintiff as it will be achieving and getting the main purpose of Ex.A.2 and the law prohibits its use for extinguishing right of any party because of want of registration of Ex.A.2.

The validity and legality of *Patta* was rightly decided by the two courts below. When the plaintiff himself admitted in the year 1969 that the property is ancestral property then he could not have obtained the Patta in his name in the Samvat Year 1990.

The appeal of the appellant deserves to be allowed only on the basis of decision on the substantial question of law no.2 as mentioned above because substantial question of law no.3 is only consequential and in fact the prayer of the plaintiff is that it my be declared that the sale deed dated 26.3.1974 is null and void to the extent to the share of the plaintiff, therefore, the plaintiff is entitled to decree of such declaration. The plaintiff being owner of the property, is also entitled to possession of the suit property to the extent of his share. At this place it will be appropriate to mould the decree because of the reason that admittedly, defendant no.4 is in possession of the suit property since

last more than 33 years. Therefore, the plaintiff shall be entitled to get the symbolic possession in place of actual physical possession of the property which he may get after his share is demarcated for which the plaintiff may file separate suit for partition wherein only, the extent of the share in the suit property of the plaintiff can be determined. The another reason for not granting decree for actual physical possession in favour of plaintiff is that the plaintiff admitted that there were six brothers of plaintiff no.1 then also it will be appropriate that plaintiff no.1 first gets his share determined and obtain decree for partition and thereafter he can get appropriate relief in accordance in law. In the same way, the plaintiff is not entitled to decree for mesne profits in this suit because of the reason that unless share of the plaintiff is determined, he cannot get mense profits because the plaintiff can be entitled to mesne profits to the extent of his share in the property.

In view of the above discussion, the judgment and decree of the appellate court dated 11.10.1989 and the lower court's judgment and decree dated 24.11.1979 are set aside. The suit of the plaintiff is decreed and it is declared that the sale-deed dated 26.3.1974 to the extent of share of the plaintiffs is of no effect against the plaintiff's rights. The plaintiffs are cosharers in the suit property to the extent of their shares. The plaintiffs shall not be entitled to decree for actual physical possession of the suit property. The plaintiffs shall be at liberty

to get their share determined by filing suit for partition and thereafter may get possession of the property to the extent of their share and the plaintiffs may seek relief of mesne profits to the extent of their share by filing the suit for partition which may be considered in that suit in accordance with law.

Accordingly, the appeal of the appellants is allowed. No order as to costs.

(**PRAKASH TATIA),J.**

mlt.